

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 7-96:

MONTANA UNIVERSITY SYSTEM,)
)
Petitioner,)
)
vs.)
)
VOCATIONAL-TECHNICAL EDUCATORS)
OF MONTANA, NO. 4610, MFT, AFT,)
AFL-CIO,)
)
Respondents)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

The Montana University System (MUS) filed its petition for unit clarification with the Board of Personnel Appeals (BOPA) in accordance with ARM 24.26.630 on April 9, 1996. The purpose of the petition was to exclude two non-teaching student services positions, Assistant Director of Financial Aid (Assistant Director) and Counselor, from the bargaining unit represented by Vocational-Technical Educators of Montana (VTEM) Local #4610. MUS contends that because of restructuring of the MUS in 1994, these two positions at the Missoula Vocational-Technical Center (MVTC) no longer share a community of interest with the rest of the bargaining unit. MUS further claims the work functions of the two positions were integrated into the University of Montana - Missoula (U of M). VTEM objected to both exclusions, but in July 1997, the parties reached a settlement with regard to the Counselor position and incumbent, Rhea Modine. The Assistant Director position, held by incumbent Dan Burke, remains in contention.

1 On November 13, 1997, Gordon Bruce conducted an in-person
2 hearing at the U of M - Missoula. Sue I. Hill, Director of Labor
3 Relations and Personnel for MUS, represented the Petitioner. Tom
4 Burgess, MFT Staff Director, represented VTEM. Witnesses, Steve
5 Atkin, Building Representative, Local #4610, Frank Sonnenberg,
6 Local #4610, Dennis Lerum, Dean of Missoula College of Technology,
7 Barbara Hollmann, Vice President and Dean of Student Services, U Of
8 M, Mick Hanson, Director of Financial Aid, and Dan Burke, Assistant
9 Director of Financial Aid, appeared at the hearing and gave sworn
10 testimony.

11 On January 8, 1998, parties filed final posthearing documents,
12 and the record was deemed fully submitted for a decision.

13 **II. ISSUE**

14 Whether the position of Assistant Director held by Dan Burke
15 is appropriately included in the VTEM bargaining unit pursuant to
16 § 39-31-202, MCA, and ARM 24.25.302.

17 **III. FINDINGS OF FACT**

18 1. MVTC hired Burke as financial aid director in June 1978
19 when it was a part of the Missoula High School District. He has
20 tenure and seniority, and his negotiated salary schedule includes
21 step and lane movements for level of education and years of
22 service. Burke is a certified teacher and has been under the
23 faculty contract during his employment with MUS. He is represented
24 by the Montana Federation of Teachers (MFT). (Exhibit #6 and
25 Testimony Burke)

26 2. During his years with the district, Burke continued his
27 education to the point of a Master's degree and has reached the top
28 of the pay schedule. When MUS assumed jurisdiction of the centers,

1 the faculty were organized under a new contract which also included
2 provisions for increasing salaries by increasing education. Burke
3 continued to accrue graduate credits and climb the salary schedule
4 provided for in the faculty contract. (Exhibit #5)

5 3. Because Burke is currently under a faculty contract, he
6 is not regularly scheduled to work during the summer months.
7 However, since 1978, Burke has worked summer months under an
8 "extended contract" which ultimately increases his salary (Union
9 Exhibit #5; Testimony Hollmann and Sonnenberg).

10 4. The university system faculty are organized and
11 represented by the Federation at four of six campuses. No other
12 bargaining unit includes financial aid or student services
13 employees. (Stipulated Facts)

14 5. Prior to 1989 the Montana Vocational-Technical Centers
15 (VTCs) were part of local high school districts. In 1987 the
16 Montana Legislature transferred governance of the Montana VTCs from
17 the high school districts to the Montana University System. (Union
18 Exhibit #3 and Testimony Sonnenberg) Burke is the last remaining
19 financial aid director still working who was affected by the 1987
20 change in statute. (Testimony Burke)

21 6. Sonnenberg helped draft the recognition clause in the
22 1989 collective bargaining agreement (Exhibit #2), and was
23 familiar with the 1987 legislation (Exhibit #3). The legislation
24 contained a clause protecting the bargaining unit rights of VTC
25 employees. Sonnenberg believed that the purpose of this change
26 "was to relieve anxiety pertaining to members of the former high
27 school bargaining unit [and] protect them from uncertainty."
28 (Testimony Sonnenberg)

1 7. In 1987, the bargaining units of all five of the VTCs
2 included the position of financial aid director. The new law in
3 1987 protected these five financial aid directors, as long as they
4 remained in the position. The law also allowed individual
5 employees or MUS to challenge the bargaining unit status of all
6 employees through the appropriate procedures governed by the Board
7 of Personnel Appeals. (Exhibit #3 and Testimony Sonnenberg)

8 8. In July 1989, the Federation and MUS negotiated a
9 collective bargaining agreement that recognized "all full-time and
10 part-time employees scheduled to teach half-time or greater and all
11 instructional related non-teaching professional employees regularly
12 scheduled to work half-time or greater who were included in a
13 school district bargaining unit prior to July 1, 1989." During
14 the period 1989 to 1997, the recognition clause never changed.
15 (Exhibit #1)

16 9. The composition of the original VTEM bargaining unit was
17 established through negotiations between the union and the
18 employer. The VTEM unit was comprised essentially of instructional
19 employees at all of the VTCs. Non-teaching professional employees,
20 such as Burke, who had been included in a school district
21 bargaining unit prior to July 1, 1989, were grandfathered into the
22 VTEM bargaining unit. All new employees hired into those
23 professional non-teaching positions are excluded from the
24 bargaining unit. (Testimony Lerum and Burke)

25 10. After restructuring of MUS by the Board of Regents in
26 1994, Burke no longer reported to Lerum. Responsibility for
27 financial aid and other student service functions was transferred
28 to the main campus of the U of M - Missoula under the direction of

1 Hollmann. Burke's position was included in the Financial Aid
2 Office organization, and Hanson became Burke's immediate
3 supervisor. (Testimony Lerum and Hollmann)

4 11. Although MUS asserts that Burke's duties and
5 responsibilities have changed since the reorganization, he is still
6 responsible for serving student needs at the College of Technology.
7 The systems and methodologies utilized by Burke remain essentially
8 the same, although the process has evolved somewhat. (Testimony
9 Burke) Burke does not have a job description and no formal changes
10 have occurred in his job responsibilities. (Testimony Hanson)

11 12. Hollmann asserted there were two reasons to change
12 Burke's bargaining unit status. First, his work is not
13 "consistent" with other financial aid directors. (Testimony
14 Hollmann) The difference, however, is that unlike financial aid
15 employees on the U of M campus, Burke is solely responsible for the
16 students at the College of Technology. He works directly with the
17 students at the college and is the only financial aid director
18 performing this responsibility. The financial aid staff on the
19 U of M campus are responsible only for specific areas of financial
20 aid, but Burke handles all aspects of financial aid on his own.
21 Further, Burke does not perform financial aid assistance to
22 students enrolled on the U of M campus, and he has very little
23 interaction with the other financial aid directors. (Testimony
24 Lerum and Burke)

25 13. Hollmann's second reason for supporting a bargaining unit
26 status change was to make all financial aid staff consistent in
27 terms of compensation schedules. (Testimony Hollmann) The
28 financial aid staff on the U of M campus have an average salary of

1 \$22,000 to \$32,000 per year. Burke earns \$50,000 under two
2 contracts, a regular school year (170 days) and an extended
3 contract. (Testimony Hanson)

4 14. It is the policy of the U of M to maintain current
5 salaries when employment status changes. Further, Hollmann put in
6 writing that Burke would remain under a Regent's Contract "as long
7 as [he] holds the position." (Testimony Hollmann and Union Exhibit
8 #4) Burke has always been under a Regent's Faculty Contract for
9 the school year. He has worked under the Regent's Contract (an
10 "extended contract") since MUS assumed jurisdiction in 1989. He
11 also worked under a Professional Employment Contract during the
12 summer months when he was employed by the school district prior to
13 1989. (Testimony Burke and Exhibit 5)

14 IV. DISCUSSION

15 MUS seeks to change the composition of a bargaining unit
16 pursuant to § 39-31-202, MCA, which authorizes the Board to
17 determine appropriate bargaining units. MUS argues that
18 restructuring the university system in 1995 has changed the job
19 responsibilities of Burke and he lacks community of interest with
20 the teaching faculty at the MVTC. Burke's uncontroverted testimony
21 shows that his job responsibilities are essentially the same.
22 Certain methodology in reporting and administrative procedures have
23 changed, but the core of his responsibilities have not changed.
24 His primary clients are College of Technology students and he still
25 is responsible for serving the student needs at the college as he
26 has done for the past 20 years.

27 Hanson, Burke's new immediate supervisor, indicated that Burke
28 does not have a job description, and no formal changes have

1 occurred to Burke's job responsibilities. Hanson believed that a
2 change in bargaining unit status for Burke "*just makes sense.*"
3 However, he could not provide one example of Burke's current
4 bargaining unit status impeding his own supervisory
5 responsibilities.

6 In *Monongahela Power Company*, 198 NLRB 177, 81 LRRM 1084
7 (1972), the National Labor Relations Board denied unit
8 clarification because the jobs of the individuals in question were
9 in existence for a number of years and there had been no recent
10 changes to their jobs. The Board stated:

11 Here, as in *Wallace - Murray*, . . . the unit placement of
12 individuals involved was made clear in the unit
13 description contained in the current agreement. And
14 their status has not changed since its execution. In
15 these circumstances, to permit one of the contracting
parties to affect a change in the definition of the unit
by means of a clarification procedure would, as we said
in *Wallace - Murray*, be disruptive of an established
bargaining relationship.

16 Further, NLRB precedent indicates that bargaining units should
17 not be clarified unless there has been a significant change in the
18 job duties of the affected employees. The Board has determined
19 that clarifications or additions to the bargaining unit in such
20 cases would be disruptive of the established bargaining
21 relationship. This doctrine was endorsed by the Fifth Circuit
22 Court of Appeals:

23 Unit clarification proceedings are not appropriate for
24 offsetting an agreement or established practice of a
25 union or employer with respect to unit placement of
26 employees. Rather, unit clarification is appropriate. . .
27 for resolving disputes concerning unit placement of
28 employees, who, for example, come with newly established
job classifications or whose duties and responsibilities
have undergone recent substantial changes. . . .

1 | *NLRB v. Magna Corporation*, 116 LRRM 2950, 734 F.2d 1057 (1984) and
2 | *Massachusetts Teachers Association*, 236 NLRB 1427, 98 LRRM 1431
3 | (1978)

4 | Under § 20-16-107, MCA, the legislature protected the
5 | bargaining unit rights of VTC employees, as long as they remained
6 | in the same position following implementation of the new
7 | legislation. Evidence presented during the hearing, specifically
8 | the testimony of Sonnenberg, reflects the "intent" of the
9 | legislature in drafting this legislation. Further, the
10 | recognition clause in the contract protected non-teaching
11 | employees, like Burke, in order to further secure the bargaining
12 | unit status of employees who remained in the same position when MUS
13 | assumed jurisdiction of the VTCs.

14 | Prior to the reorganization, Burke's position may have lacked
15 | community of interest with other unit members because of the job
16 | specialization. Nevertheless, even after the 1989 reorganization,
17 | he continued employment under contracts bargained by VTEM and the
18 | MUS. Although the Montana Legislature in 1995 repealed § 20-16-
19 | 107, MCA, which granted protection to Burke's position, the past
20 | practice of negotiations between VTEM, and the U of M continued as
21 | it had before the repeal. During all this time, no substantial
22 | changes really occurred in the work performed by Burke.

23 | The financial aid position has been protected by the contract
24 | recognition clauses from 1989 to 1997, and to now remove Burke from
25 | the faculty bargaining unit would apparently strip him of his
26 | status as a tenured faculty member. Further, although the record
27 | is not clear on the matter of vesting, the potential exists for
28 |

1 additional vesting requirements pertinent to classified employees
2 if he is removed from his bargaining unit status.

3 **V. CONCLUSIONS OF LAW**

4 1. The Board of Personnel Appeals has jurisdiction in this
5 matter pursuant to the Montana Collective Bargaining for Public
6 Employees Act, § 39-31-101, et seq., MCA.

7 2. The position of Assistant Director of Financial Aid held
8 by Dan Burke properly remains a part of Vocational-Technical
9 Educators of Montana Local #4610.

10 **VI. RECOMMENDED ORDER**

11 The Petition by the Montana University System to exclude the
12 Assistant Director of Financial Aid position from the VTEM Local
13 #4610 bargaining unit is **DENIED** pursuant to A.R.M. 24.26.630.

14 DATED this 27th day of April, 1998.

15 BOARD OF PERSONNEL APPEALS

16 By: Gordon D. Bruce
17 Gordon D. Bruce
18 Hearing Officer

19 NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER
20 shall become the Final Order of this Board unless written
21 exceptions are postmarked no later than May 20, 1998.
22 This time period includes the 20 days provided for in ARM
23 24.26.215, and the additional 3 days mandated by Rule 6(e),
24 M.R.Civ.P., as service of this Order is by mail.

25 The notice of appeal shall consist of a written appeal of the
26 decision of the hearing officer which sets forth the specific
27 errors of the hearing officer and the issues to be raised on
28 appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59604

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Sue Hill, Director
Labor Relations and Personnel
Montana State University
Office of Commissioner of Higher Education
2500 Broadway
Helena, MT 59620

Tom Burgess, Staff Director
Vocational-Technical Educators of Montana, #4610
MFT, AFT, AFL-CIO
P.O. Box 6169
Helena, MT 59620

DATED this 21th day of April, 1998.

Christine A. Noland